

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.5451 OF 2005

Suresh Indulal Shah.

...Petitioner.

Vs.

Municipal Corporation of Pune.

...Respondent.

....

Ms.Chandana Salgaonkar for the Petitioner.

Mr. R. M.Pethe i/b. Mr. R.G. Ketkar for the Respondent.

.....

**CORAM : KSHITIJ R. VYAS, C.J. &
DR.D.Y.CHANDRACHUD, J.**

April 17, 2006.

P.C. (Per Dr. D.Y. Chandrachud, J.):

The Petitioner claims to be the owner of certain landed property comprised in Survey No.221/2A (Final Plot 987/A) situated at Navi Peth, Lal Bahadur Shastri Marg, Pune, admeasuring 7486.65 sq.mtrs. It has been averred that of the aforesaid land 5743 sq.mtrs is retainable while 1743.32 sq.mtrs. was surplus under the Urban Land (Ceiling and Regulation) Act, 1976. A scheme under Section 20 is stated to have been sanctioned. It has been averred that the retainable property as reflected was reserved in the Development Plan for the City of Pune for a Shopping Centre. The Municipal Corporation passed a resolution

on 20th August 1988 permitting the owner to develop the property for a Shopping Centre subject to handing over 30% of the constructed area free of cost to the Corporation on ownership basis. A commencement certificate was issued on 26th April 1989. According to the Petitioner, the Municipal Corporation proposed a modification to the Development Control Rules in September 1993 under which it was envisaged that with respect to Shopping centers, the Corporation may acquire the land and develop it or, alternatively, the owner may be allowed to develop a Shopping Centre, after handing over 15% of the built up area of total permissible FSI free of cost to the Corporation. An agreement was entered into between the Petitioner and the Corporation on 24th February 1994 by which the Petitioner agreed to hand over 30% of the constructed area. However, it has been stated that there was a clause by which parties agreed that if there was a change in Government Policy, the benefit thereof would be given to the Petitioner. It has been stated that the modification to the Development Control Rules was published on 3rd July 1997 by the State Government and was brought into force.

2. The Petitioner filed proceedings under Article 226 of the Constitution before this Court (Writ Petition 5814 of 1997) for a direction to the Corporation to consider the building plans in accordance with the scheme sanctioned under Section 20 of the Urban Land Ceiling Act in respect of an area comprising of 1743.32 sq.mtrs. without insisting upon any reservation of the constructed area from the proposed residential construction and for a direction that the Corporation should give to the Petitioner the benefit of the change in governmental policy that was brought about with effect from 3rd July 1999. The petition came to be disposed of by a Division Bench of this Court on 7th September 2004 with the following directions :

“(a) The Petitioner is directed to hand over 15% of the constructed area free of cost in so far as retainable land is concerned of an area admeasuring 5743 sq.mtrs.

-(b) In so far as the excess land of an area of 1743 sq.mtrs. is concerned and in respect of which scheme is sanctioned under ULC Act the Petitioner shall hand over 30% of the constructed area free of cost to the respondent corporation herein.”

3. It has been averred in the petition that three buildings, Buildings 'A' 'B' and 'C' have been constructed of which Building 'A' is commercial, Building 'B' is constructed for the Corporation and Building 'C' is a residential building. It has been stated that a commencement certificate was granted on 26th April 1989 and the completion certificate of the first part was issued in 1994. In 1998, it has been stated that a part of the building was completed and the Petitioner made an application to the Respondent-Corporation to grant an occupation certificate. Without the grant of an occupation certificate, the Petitioner gave the premises to certain parties who were placed in occupation. According to the Petitioner under Section 263(2)(b) of the Bombay Provincial Municipal Corporation Act, 1949, permission for occupation was deemed to have been granted after the expiry of a period of 21 days since there was no response from the Municipal Corporation and it is contended that the Corporation has levied assessment upon the occupiers who are paying taxes onwards from 1998. A revised commencement certificate was granted in July 2000 and the Petitioner is stated to have submitted a revised plan in August 2000. Then it has been

averred that an application for the issuance of an occupation certificate was submitted on 23rd January 2004 for Building 'A' .For Building 'C', it has been averred that a commencement certificate was granted in March 1999 and an application for issuance of a part commencement certificate for the fourth floor was submitted on 13th October 2003.

4. The case of the Petitioner, therefore, centers around the submission that upon the failure of the Municipal Corporation to grant the occupation certificate within 21 days, the Petitioner is deemed to have been issued an occupation certificate under Section 263(2)(b). On 21st March 2005 notices were issued under Section 268(1) of the Bombay Provincial Municipal Corporation Act, 1949 by the Corporation calling upon the occupiers and users of the premises to vacate the same. This was followed by a notice under Section 478(1) on 23rd March 2005 for the demolition of certain allegedly illegal structures. That has led to the institution of these proceedings. The Petitioner has sought the issuance of a writ of certiorari for quashing the notices dated 21st March 2005

and 23rd March 2005 and a writ of Mandamus directing the Municipal Corporation to issue a completion certificate in terms of the Petitioner's application dated 13th October 2003.

5. In reply to the petition, an affidavit has been filed by the City Engineer of the Municipal Corporation in which it has been stated that the Petitioner claims an occupation certificate in respect of Building 'A' which is a commercial building and Building 'C' which is a residential building. The contention of the Municipal Corporation is that the basically Buildings 'A' and 'C' are not complete and that the requirement of 10% open space works out to 748.66 sq.mtrs. The actual inspection of site showed that the open space that is kept aside is 595.27 sq.mtrs. In other words there is a short fall of 153.39 sq.mtrs. of the requirement of open space in view whereof it was submitted that the Petitioner is not entitled to an occupation certificate. It has been stated that on 24th June 2005, the Assistant Engineer, Development Plan communicated objections to the Petitioner. Pursuant thereto, the site was inspected on 12th August 2005 when the Petitioner was informed

that as against the required open space of 748.66 .sq.mtrs., the actual open space was 595.27 sq.mtrs. leaving a deficiency of 153.39 sq.mtrs. Accordingly, the Petitioner was required to obtain sanction to a revised layout. A letter dated 10th October 2005 was addressed to the licensed Architect of the Petitioner for compliance with the requisitions set out in respect of commercial Building 'A' and it was stated that toilets are required to be constructed on the Ground Floor and basement parking was required. Subsequently, the Assistant Engineer of the Building Control Department addressed a letter dated 13th December 2005 to the developer stating that action for issuing a completion certificate in respect of Buildings 'A' and 'C' would be taken after the revised layout is sanctioned. Reliance has been placed on the correspondence between the parties and it has been stated that the Petitioner ought to revise the layout indicating fulfillment of the deficit of the open area requirement to the extent of 153.39 sq.mtrs. In respect of residential Building 'C', it has been stated that under the sanctioned plan, the Petitioner has to connect the residential building to the row houses which has not been done.

Some part of the grievance in the petition has been met in that it has been averred in the reply that the notices of demolition under Section 478 were withdrawn since the construction mentioned therein came to be regularised. The Corporation has stated that it is ready and willing to sign an agreement with the Petitioner subject to due compliance of its requisitions.

6. In view of the deficiency of open space which has been adverted to, in the reply filed by the Municipal Corporation, the deeming fiction in regard to the grant of an occupation certificate under Section 263(2)(b) of the Bombay Provincial Municipal Corporation Act, 1949 cannot operate. It is a settled principles of law that in town planning Legislation, a deeming fiction of the nature can, if at all, operate only when the proposal for the grant of an occupation certificate is duly complete in all respects and constitutes a clear and strict compliance with the sanctioned building plan as well as with the requirements of law. In the present case, the reply filed by the Corporation shows that there is a deficiency of open space. That being the position, we are of the

view that relief of the nature that has been sought in these proceedings cannot be granted. The Court cannot issue a writ of Mandamus commanding the Corporation to deviate from the requirement of open space since that is a part of a validly sanctioned Development Plan and is in accordance with the Development Control Regulations which govern any development carried on within the limits of the Municipal Corporation. Counsel appearing on behalf of the Municipal Corporation has stated before the Court that the Corporation is willing to consider the application for the grant of an occupation certificate subject to the fulfillment of its requisitions which have already been indicated in the correspondence annexed to the affidavit in reply. Having regard to the aforesaid position, we are of the view that this petition can be disposed of by directing the Petitioner to submit a revised layout within a period of one week from today if it has not been already submitted by this date. Upon the submission of a revised layout, the Municipal Corporation can be directed to scrutinize it in accordance with law within a period of four weeks thereafter and to take an appropriate decision.

7. In the circumstances, we issue the following directions:

-(i) The Petitioner shall submit a revised layout to the Municipal Corporation for the purposes of compliance of the requisitions of the Corporation within one week from today, if it has not already been submitted;

-(ii) The Municipal Corporation shall scrutinize the revised layout and upon receipt of all complete information from the Petitioner for consideration of the proposal, the Municipal Corporation shall arrive at a final decision within a period of four weeks thereafter;

-(iii) If the Petitioner is thereafter aggrieved, it is needless to add that it would be open to the Petitioner to take recourse to such remedies as are available in law.

8. The petition is accordingly disposed of. No order as to

costs.

CHIEF JUSTICE

Dr.D. Y. Chandrachud, J.